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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

EPIC GAMES, INC.,

Plaintiff, Counter-
defendant

v.

APPLE INC.,

Defendant,
Counterclaimant.

Case No. 4:20-cv-05640-YGR-TSH

**DECLARATION OF RACHEL S. BRASS IN
RESPONSE TO EPIC GAMES, INC.'S
ADMINISTRATIVE MOTION TO SEAL
PORTIONS OF PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

1 Pursuant to Civil Local Rule 79-5, I hereby declare as follows:

2 1. I am an attorney licensed to practice in the State of California, and a member of the Bar
 3 of this Court. I am a partner at the law firm Gibson, Dunn & Crutcher LLP, counsel of record for
 4 Defendant Apple Inc. (“Apple”) in this case. I am familiar with Apple’s treatment of highly proprietary
 5 and confidential information, based on my personal experience representing Apple.¹ I have personal
 6 knowledge of the facts stated below and, if called as a witness, I could and would testify competently
 7 thereto.

8 2. I submit this declaration in response to Epic’s Administrative Motion to Seal Its
 9 Proposed Findings of Fact and Conclusions of Law (Dkt. 404). Specifically, Apple joins Epic’s Motion
 10 in part. After reviewing the underlying Proposed Findings of Fact and Conclusions of Law (Dkt. 404-
 11 1), Apple narrows Epic’s sealing requests.

12 3. Federal Rule of Civil Procedure 26(c), generally, provides the “good cause” standard
 13 for the purposes of sealing documents attached to a dispositive motion or presented at trial. *Kamakana*
 14 *v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179-80 (9th Cir. 2006). The test applied is whether
 15 “‘good cause’ exists to protect th[e] information from being disclosed to the public by balancing the
 16 needs for discovery against the need for confidentiality.” *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665,
 17 678 (9th Cir. 2010) (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213
 18 (9th Cir. 2002)).

19 4. Apple operates in an intensely competitive marketplace. It occupies a unique position
 20 as a leader with respect to a number of highly dynamic technologies. Apple has serious and legitimate
 21 concerns that competitors will be quick to pounce on any release of Apple’s highly sensitive,
 22 proprietary information in order to gain competitive advantage. As such, Apple takes extensive
 23 measures to protect the confidentiality of its proprietary information.

24

25 1 Courts in this District routinely grant motions to seal on the basis of declarations of counsel
 26 submitted pursuant to Local Rule 79-5. See, e.g., *In Re Qualcomm Litig.*, No. 17-00108, Dkt. 398-
 27 1 (S.D. Cal. Mar. 3, 2018); *Avago Techs. U.S. Inc., et al. v. Iptronics Inc., et al.*, No. 10-02863-
 28 EJD, Dkt. 544 (N.D. Cal. Apr. 3, 2015); *Cisco Sys., Inc., et al. v. Opentv Inc., et al.*, No. 13-00282-
 EJD, Dkt. 76 (N.D. Cal. Oct. 8, 2018). I am personally familiar with Apple’s safeguarding of
 proprietary information, but if the Court deems this declaration insufficient, Apple respectfully
 requests that it be permitted to file a further declaration supporting filing under seal.

1 5. The Court has “broad latitude” “to prevent disclosure of materials for many types of
 2 information, including, *but not limited to*, trade secrets or other confidential research, development, or
 3 commercial information.” *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002)
 4 (emphasis in original).

5 6. The Court has expressed a desire for these proceedings to be public. To that end, Apple
 6 has carefully reviewed Epic’s Proposed Findings of Fact and Conclusions of Law (Dkt. 410) and now
 7 proposes only those redactions that are essential.

8 7. Specifically Apple seeks only to seal information about (1) non-public financial
 9 information; and (2) competitively sensitive information that could aid a bad actor.

10 8. Apple first seeks to seal non-public financial information. The public disclosure of such
 11 information would cause Apple economic harm and put it at competitive disadvantage. *See Ctr. for*
 12 *Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016), *cert. denied sub nom. FCA*
 13 *U.S. LLC v. Ctr. for Auto Safety*, 137 S. Ct. 38 (2016) (finding there was a compelling reason for sealing
 14 when records contain business information that could be used to harm a litigant’s competitive
 15 standing). It would give Apple’s competition confidential information about Apple’s business model
 16 and strategy. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214, 1225 (Fed. Cir. 2013)
 17 (concluding the district court abused its discretion in denying a motion to seal about “profit, cost, and
 18 margin data”).

19 9. The information Apple seeks to protect is foundational to its business, and Apple has
 20 exerted great effort and undertaken substantial expense to protect such information. Apple has
 21 narrowly tailored its sealing request so as to maximize the public’s access to court proceedings without
 22 jeopardizing Apple’s business interests.

23 10. Second, Apple respectfully requests that the Court seal the identified information that
 24 could aid a bad actor. Specifically, Apple seeks to seal specific information about Apple’s security
 25 policies and internal processes like Apple’s App Review process. Sealing of court records is
 26 appropriate “when such ‘court files might . . . become a vehicle for improper purposes,’” *Kamakana*,
 27 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. at 598).

1 11. Public disclosure of this information would risk providing assistance to competitors and
 2 third parties seeking to unlawfully access or steal data. Apple takes many steps, and undertakes
 3 substantial efforts, to safeguard information—including its trade secrets and private confidential data
 4 of its customers and developers—and keeping those efforts confidential is important to their
 5 effectiveness.

6 12. Not only does Apple protect critical information through its internal security systems
 7 and processes, Apple also protects users and developers alike from fraud, malware, and unwarranted
 8 intrusion into their privacy through its extensive App Review Process. Disclosure of the identified
 9 information would allow bad actors to circumvent Apple's important review process and would
 10 endanger users and developers.

11 13. I have met and conferred in good faith with counsel for Epic, including by telephone, in
 12 an effort to narrow the documents and testimony that the parties propose to maintain under seal. This
 13 process has resulted in further narrowing the amount of designated confidential material and
 14 consequently reduced the need for provisional sealing (pursuant to Local Rule 79-5(e)) of material
 15 designated by the other party as confidential. The unredacted version of Epic's Proposed Findings of
 16 Fact and Conclusions of Law submitted here reflects results of that negotiation.

17 14. After reviewing Epic's Proposed Findings of Fact and Conclusions of Law, Apple has
 18 specified in the chart below the specific requests that Apple concedes should not be granted. In each
 19 instance, Apple's responses relate only to the confidentiality of the statements in Epic's Proposed
 20 Findings of Fact and Conclusions of Law; Apple's responses are not meant to concede the accuracy of
 21 those or any other statements in Epic's filing. In addition, Apple's responses and motion relate only to
 22 confidential information contained in the text of Epic's Findings of Fact and Conclusions of Law, and
 23 not to the exhibits or deposition designations cited therein. See ECF Dkt. 374 (providing separate
 24 process for de-designation of exhibits and deposition designations).

Paragraph of Proposed Findings of Fact	Notes
¶ 7	
¶ 10	
¶ 15	
¶ 30	
¶ 39	

Paragraph of Proposed Findings of Fact	Notes
¶ 40	
¶ 42	
¶ 46	Apple concedes that some of this material need not be sealed but requests one redaction in this paragraph.
¶ 59	
¶ 78	Apple takes no position on the third party material that has been redacted but concedes that Apple's material need not be sealed.
¶ 81.a	
¶ 102	
¶ 114.b	
¶ 114.c	
¶ 121	
¶ 123.d	
¶ 142.d	
¶ 160	Apple concedes that some of this material need not be sealed but requests one redaction in this paragraph.
¶ 161	
¶ 166.e	
¶ 174.c	
¶ 176.d	
¶ 192	
¶ 210	
¶ 236	
¶ 237	
¶ 244	
¶ 248(c)	
¶ 265(d)	
¶ 274	
¶ 285(g)	
¶ 287(c)	
¶ 297(a)	Apple concedes that some of this material need not be sealed but requests one redaction in this paragraph.
¶ 305(b)	
¶ 305(c)	
¶ 309	
¶ 313	
¶ 332(b)	
¶ 472(a)	
¶ 484(b)	
¶ 493(b)	
¶ 495(a)	
¶ 495(b)	
¶ 503	
¶ 505(b)	
¶ 505(c)	
¶ 505(d)	
¶ 510	
¶ 512	
¶ 512(a)	

Paragraph of Proposed Findings of Fact	Notes
¶ 513	
¶ 515	
¶ 516	
¶ 517	
¶ 520(a)	
¶ 520(b)	
¶ 521(d)	
¶ 522	
¶ 525(c)	
¶ 526	
¶ 527	
¶ 530(f)	
¶ 530(i)	
¶ 536(a)	
¶ 536(b)	
¶ 537	
¶ 540(c)	
¶ 542(a)	
¶ 544(a)	
¶ 547	
¶ 549	
¶ 550(e)	
¶ 550(g)	
¶ 550(i)	
¶ 550(j)	
¶ 551(a)	
¶ 551(b)	
¶ 551(c)	
¶ 552	
¶ 552(a)	
¶ 552(b)	
¶ 552(d)	
¶ 552(e)	
¶ 552(f)	
¶ 553	
¶ 560(b)	
¶ 560(f)	
¶ 564(a)	
¶ 564(c)	
¶ 571	
Paragraph of Conclusions of Law	Notes
¶ 19	Apple concedes that some of this material need not be sealed but requests one redaction in this paragraph.
¶ 59	Apple concedes that some of this material need not be sealed but requests one redaction in this paragraph.
¶ 70	

Paragraph of Conclusions of Law	Notes
¶ 71	Apple concedes that some of this material need not be sealed but requests one redaction in this paragraph.
¶ 72	
¶ 73	
¶ 101	
¶ 102	
¶ 104	
¶ 107	Apple concedes that some of this material need not be sealed but requests some redactions in this paragraph.
¶ 108	Apple concedes that some of this material need not be sealed but requests some redactions in this paragraph.
¶ 149	
¶ 259	
¶ 274	Apple concedes that some of this material need not be sealed but requests some redactions in this paragraph.
¶ 295	
¶ 302	
¶ 311	
¶ 358	

15. Below is a chart detailing the specific items of Apple's that are sealable for the reasons explained herein, highlighted in yellow in the attached unredacted version.

Paragraph of Proposed Findings of Fact	Reason for Redaction
¶ 35	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)
¶ 46	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)
¶ 123.e	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)
¶ 124	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)
¶ 160	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)
¶ 231	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)
¶ 232	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)
¶ 233	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)
¶ 234	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)
¶ 235	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶ 8-9)

Paragraph of Proposed Findings of Fact	Reason for Redaction
¶ 239.b	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 297(a)	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 303	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 552(c)	Contains confidential information that could be used to evade the App Review process (Brass Decl. ¶¶ 10-11)
¶ 564(b)	Contains confidential information that could be used to evade the App Review process (Brass Decl. ¶¶ 10-11)
Paragraph of Conclusions of Law	Reason for Redaction
¶ 18	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 19	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 59	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 71	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 91	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 107	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 108	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 274	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 310	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)
¶ 381	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage (Brass Decl. ¶¶ 8-9)

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed on April 12, 2021 at San Francisco, California.

/s/ *Rachel S. Brass*
Rachel S. Brass